IN THE UNITED STATE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARGARET OROSZ 333 Mamaroneck Avenue White Plains, NY 10602, Plaintiff, vs. REGENERON PHARMACEUTICALS, INC. 777 Old Saw Mill River Road Tarrytown, NY 10591, Defendant.	Civil Action No.: 7:15-cv-08504(NSR) [ORAL HEARING REQUESTED]

DEFENDANT'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

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INTRODUCTION

Plaintiff's opposition demonstrates that on both issues before the Court, she wants to have it both ways. On the allegations in the Second Amended Complaint itself, Plaintiff would have this Court disregard documents that are not only referenced but are integral to her allegations. However, if they are considered, she would like this Court to rely upon (without a single evidential foundation) a recently created document that purports to be (but is not) a side-by-side comparison of job descriptions.

The second part of her desire to have things both ways is her attempt to bootstrap the failure to hire claim by artificially linking a non-existent 2014 position at Regeneron (Facilities Architect) to a position (BIM/AutoCAD Specialist) that was created over six months after Plaintiff stopped performing services to Regeneron as a contractor supplied by Microsol Resources ("Microsol"). This latter position carries qualifications that Plaintiff does not possess, and most importantly, is one for which Plaintiff did not apply despite the fact it was publicly posted.

These fanciful notions upon which Plaintiff argues justifies allowing her claim to survive the within motion have no evidential or legal support and thus should be flatly rejected. Quite simply, Plaintiff's failure to hire claim should be dismissed. As discussed in Regeneron's initial brief and further expanded in this Reply, a straightforward review of the facts and legal precepts demonstrates that no position was created in 2014, and as such, there can be no claim for a failure to hire. In other words, there was no position for which Plaintiff could have applied (even using the most liberal view of "application" as the case law permits) and Regeneron did not seek applicants for such a non-existent position after Plaintiff stopped performing work at Regeneron through Microsol.

If Plaintiff claims that the March 2015 BIM/AutoCAD position, created six months after Plaintiff's Microsol contract ended, for which Plaintiff did not apply and for which she was not qualified, is the basis for her claim, that too should be dismissed out of hand as legally deficient. Case law (as well as common sense) dictates that if a person did not apply and is not qualified for a position, there can be no claim for failure to hire.

Accordingly, in consideration of the arguments set forth in Regeneron's initial brief, and those expounded upon below, this Court should grant Regeneron's motion to dismiss Count IV of the Second Amended Complaint.

LEGAL ARGUMENT

A. THE DOCUMENTS ARE PROPERLY BEFORE THIS COURT AND SHOULD BE CONSIDERED ON THIS MOTION

Plaintiff spends a great deal of her time in the opposition brief arguing that Regeneron should not be able to rely on documents in the motion because they are neither incorporated by reference nor integral to the Second Amended Complaint. Plaintiff is flatly wrong on both counts. But before turning to the arguments, this Court should take notice that Plaintiff offered nothing evidential, either by way of an affidavit or declaration, to support the statement that these documents were neither incorporated nor integral. This is telling and undercuts the veracity of the statements themselves, while at the same time leaves the Second Amended Complaint as the sole source.

Turning to the job description, the allegations in the Second Amended Complaint plainly references the job description. Paragraph 45 of the Second Amended Complaint states:

> In or around January 2014, Manager Hamilton met with Plaintiff to discuss her transition to a permanent position with Defendant and instructed Plaintiff to draft a job description for her permanent position.

See Farella Decl. at Ex. A. For Plaintiff to argue that a copy of the very job description specifically referenced in her complaint – that she assisted in drafting – is neither incorporated nor integral to the complaint is patently absurd.

In addition to the job description, the e-mails, which Plaintiff admits having knowledge of (and actually authored) are clearly incorporated in or integral to the Second Amended Complaint. Plaintiff claims a position was created for her by Regeneron in 2014 and states there were "ongoing discussions" regarding this position. *See* Pl. Br. 11, citing Second Am. Compl. ¶¶ 42-43, 46-47. These e-mails, while potentially disproving the allegations, depict the "ongoing discussions" but are evidence that no such position existed. To wit:

- On June 6, 2014, Hamilton emailed Plaintiff to tell her that she would be speaking to Michelle Fritsche, Director of Facilities, who was the person with the authority to make hiring decisions. *See* Farella Decl. at Ex. C. (No position created)

- On June 24, 2014, Plaintiff wrote in an email to Hamilton that she was seeking an "update on my transition from `external' to a full-time employment offer." *See* Farella Decl. at Ex. D. Hamilton responded shortly after receiving the email that she "ha[s] to sit with Michelle to see how she wants to proceede [sic]." *See id.* (Still no position created)

- On July 9, 2014, Plaintiff once again reached out to Hamilton for an update. In the email, Plaintiff noted that Hamilton was supposed to speak with Fritsche but "no progress has been made otherwise" to transition her to "full-time employment." Plaintiff also acknowledged that Hamilton "re-signed another contract with Microsol." *See id.* at Ex. C (Definitive answer that no position was created and that Plaintiff would remain a contractor).

Notably, Plaintiff's Exhibit A strengthens the conclusion that indeed no job was created for Plaintiff during her time working as a contractor at Regeneron. In the top right corner of

Exhibit A is the date of March 12, 2015. This is over six months **after** Plaintiff stopped performing services to Regeneron as a contractor supplied by Microsol. Regeneron posted this position – for a BIM/AutoCAD Specialist - including key requirements for the position being "10-15 years minimum professional post-degree work experience in an architectural/interiors/planning or similar practice environment" and "5+ years hands on experience with Revit/BIM."[1]

Case law does not support Plaintiff's argument. Reliance on *Tubbs v. Stony Brook Univ.*, 2016 U.S. Dist. LEXIS 28465 (S.D.N.Y. 2016) is misplaced. First and foremost, *Tubbs* is an unreported decision and does not constitute precedent upon which this Court must rely. Second, it is highly distinguishable from the case at hand. District Court Judge Roman, analyzing the 21 exhibits attached to Stony Brook's motion to dismiss, found that six were not documents for which plaintiff had any knowledge, and one was released after the complaint was filed. *See Tubbs* at *15-16.

Here, Plaintiff has acknowledged her awareness of the e-mails and job description, as she must, since she authored most of them. *See* Pl. Br. at p. 6. None of the documents post-date the Second Amended Complaint (nor any earlier iterations).

Of the fourteen remaining documents considered in *Tubbs*, ten were excluded from consideration because they were "generally referenced" in the complaint or were trial transcripts. *See Tubbs* at *16-18. The documents attached to the within motion do not fit this preclusive category. The job description is explicitly referenced as something Plaintiff, herself, had a hand in drafting and was the position to which she believes she's entitled. Plaintiff further concedes that there were "ongoing discussions" regarding this position. *See* Pl. Br. 11, citing Second Am. Compl. ¶¶ 42-43, 46-47. Since the e-mails at issue are evidence of these "ongoing discussions" Plaintiff can hardly claim they are not integral or relied upon in drafting the complaint.

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[1] Plaintiff failed to incorporate these critical distinctions into her alleged side-by-side comparison of the duties. This deliberate omission is meant to distract the Court's attention from the fact that Plaintiff knows she cannot qualify for this position with those requirements, and thus cannot proceed with a failure to hire claim.

In addition, the Second Circuit in *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42 (2d Cir. 1991), which is cited by Judge Roman in *Tubbs*, held that:

> A finding that plaintiff has had notice of documents used by defendant in a 12(b)(6) motion is significant since … the problem arises when a court reviews statements extraneous to a complaint generally is the lack of notice to the plaintiff that they may be so considered …
>
> Where plaintiff has actual notice of all the information in the movant's papers and has relied upon those documents in framing the complaint, the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated.

Id. at 48. In other words, the Second Circuit does not demand rigidity in exactly how the documents may have been used in drafting the complaint. Indeed, the Second Circuit only requires that the documents be used in "framing the complaint" which is sufficiently expansive to include the documents attached to Defendant's motion.

In this case, the concerns expressed by the Second Circuit in *Cotrec* are not present. Plaintiff had notice of the documents Regeneron used in the motion (in fact, she drafted some of them) and clearly can be viewed as having used them "in framing the complaint." Thus, the documents at issue should be considered in resolving this motion.

B. PLAINTIFF CANNOT SATISFY THE ELEMENTS OF A FAILURE TO HIRE CLAIM

The only concession Regeneron made was that Plaintiff was a member of a protected class. Each and every other element is disputed, and, frankly, factually devoid. Accordingly, Regeneron's motion to dismiss should be granted.

1. Regeneron Did Not Have A Position In 2014 In Which It Was Seeking Applicants

Plaintiff claims Regeneron is engaging in "deceptive semantics," claiming that it did not create a position and did not seek applicants for it. *See* Pl. Br. at 9. Plaintiff's premise for this accusation is the existence of a job posting with different essential requirements for which Plaintiff did not apply and that was created **six months after** Plaintiff stopped performing services to Regeneron as a contractor supplied by Microsol. The fact of the matter is that Plaintiff simply was not qualified for that position, one distinct in several respects from the one Plaintiff alleges was created for her. Regeneron did not engage in any deception; the facts are straightforward. The Facilities Architect position, the description for which Plaintiff helped draft, never came into existence. Six months after Regeneron did not renew Microsol's contract to supply Plaintiff, a different position – BIM/AutoCAD Specialist – with significantly different job requirements, was posted but Plaintiff never applied for it.

Applying for or expressing interest in a specific position is a condition precedent to establishing a *prima facie* case for a failure to hire/promote claim. *Brown v. Coach Stores, Inc.*, 163 F.3d 706, 710 (2d Cir. 1998). Plaintiff did not apply for this later position posting and thus, Regeneron should not be held responsible to her for an alleged claim of failure to hire. If a party is being deceptive, it would be Plaintiff who is trying to bend the temporal bounds of the law to assert Regeneron failed to hire her for a position in August 2014 and somehow claim that obligation continues on for a position that was not posted until April 2015, for which she was not qualified and for which she did not apply.

Moreover, Plaintiff's attempt at a side-by-side comparison of job descriptions fails to bring her claim any closer to viability. First, Plaintiff deliberately omits critical requirements from the comparison, attempting unsuccessfully to gloss over the disqualifying nature of them.

Second, putting trickery aside, even if the positions were similar in wording, the additional experience required makes them markedly different positions. Plaintiff cannot tack on her potential qualification for the 2014 Facilities Architect position to the 2015 BIM/AutoCAD Specialist position just because the job duties share similar descriptions. The ultimate years of and depth of experience with an emerging technology transforms the position into something different for which Plaintiff had to actually qualify and apply for in order to proceed with her claim.

2. Regeneron Did Not Reject Plaintiff And Still Seek Applicants

Since there was no position created in 2014, no other applicants were sought, reviewed or accepted. Simply put, since there was no position, formally or informally, Plaintiff could not have been rejected from it nor could it have remained open for Regeneron to seek additional applicants. Plaintiff has not come forward with any factual basis to the contrary except for an empty allegation. Mere allegations of this nature should not be permitted to survive a 12(b)(6) motion under *Iqbal* and *Twombly* standards.

Even if Plaintiff alleges that somehow there is a link between the position in 2014 and the position in 2015, she cannot meet any criteria other than being a member of a protected class. As part of plaintiffs' *prima facie* cases in failure to hire claims, courts generally require that (i) the plaintiff establish that she applied for the specific position but did not receive an offer and (ii) the defendant continued to seek applicants with plaintiff's qualifications. Since Plaintiff did not apply for the position of BIM/AutoCAD Specialist in or around March 2015, Regeneron could not have rejected her. Additionally, Plaintiff does not and cannot plead that she was qualified for the BIM/AutoCAD position and that Regeneron sought applicants with Plaintiff's qualifications. Indeed, Plaintiff concedes she was not qualified for the BIM/AutoCAD Specialist position and attempts to circumvent this express pleading requirement by wildly claiming Regeneron introduced significant changes to the job requirements and responsibilities to disqualify her.

Moreover, *Weeks v. Mich. Dept. of Cmty Health,* 587 FedAppx 850 (6th Cir. 2014) does not resuscitate Plaintiff's claim by altering or excusing satisfaction of the fourth prong of the failure to hire criteria. *Weeks* is a motion for summary judgment that is not predicated upon the same facts or legal grounds as the case presently before this Court. *Weeks* is a failure to promote case intertwined with a retaliation claim which analyzes whether plaintiff – who engaged in protected activity prior to the promotion decision - should have been given the promotion or was defendant correct in awarding it to the person who actually received the promotion. *See id* at 856 ("While their relative qualifications were unquestionably different, we cannot say with certainty that one candidate was objectively superior for the CFP Director position. Because a reasonable jury could find that Plaintiff was at least as well-qualified as Holden, Plaintiff has satisfied his burden of proof on the fourth element."). This is a highly subjective factual analysis and one that does not need to occur in the within case.

More importantly, *Weeks'* discussion of the additional requirement for the job at issue has no connection to the present facts. In *Weeks,* the issue arose when defendant attempted to explain its legitimate business reasons for not selecting plaintiff. *See id.* at 858. Defendant stated that it had a long-standing policy of requiring clinical experience, which plaintiff did not possess. The difficulty with that argument was threefold: 1) there was no written evidence of such a policy; 2) applying it to plaintiff was the only time the policy was used; and 3) if the policy was applied to some of defendant's other incumbent employees, they would not have the requisite experience to satisfy it. Because of these issues, the Sixth Circuit determined that a reasonable jury could find that the addition of the clinical experience was retaliation for plaintiff engaging in protected activity. *See id.*

None of these considerations are at issue here. Plaintiff alleges that Regeneron failed to hire her for the full time position of Facilities Architect in August 2014 but did not do so because she was pregnant, and continued seeking applicants for that position. As described above, unlike the typical "failure to hire" case, there was no open position at that time, Plaintiff never formally applied, and Regeneron never selected someone else to fill the position. These factors are fatal to her claim.

Even assuming that when Regeneron posted a new position over six months later and changed the criteria to now require experience that Plaintiff admittedly does not possess, *Weeks* does not create a failure to hire claim. Nowhere can *Weeks* be read to stand for the proposition that, when deciding actual occupational needs, a company is subject to liability because it chose to seek applicants with greater qualifications than a theoretical position discussed with a contractor.

Nor can *Weeks* be read to excuse Plaintiff from fulfilling each prong of the test for a claim of failure to hire. Since it has been amply demonstrated that she cannot do so, Count IV, should be dismissed.

CONCLUSION

For the reasons set forth above and in Defendant Regeneron's initial moving brief, this Court should dismiss Count IV of the Second Amended Complaint for failure to state a claim.

Dated: July 5, 2016

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